

JACKSON COUNTY, OREGON, and
THE PUBLIC GUARDIAN FOR
JACKSON COUNTY,
Appellants

v.

PHOENIX AREA DIRECTOR,
BUREAU OF INDIAN AFFAIRS,
Appellee

: Order Denying Application for
: Attorney Fees Under the
: Equal Access to Justice Act
:
:
: Docket No. IBIA 96-26-A
:
:
: November 25, 1997

On October 8, 1997, the Board of Indian Appeals (Board) received an Application for Award of Fees and Expenses from Appellants Jackson County, Oregon, and the Public Guardian for Jackson County. The Application, which was filed under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1994), 1/ seeks an award of attorney fees and expenses based on Appellants' participation in the proceeding which resulted in the Board's decision in Jackson County, Oregon v. Phoenix Area Director, 31 IBIA 126 (1997).

At page 1 of an order dated October 10, 1997, the Board stated:

Departmental regulations implementing the EAJA are found in 43 C.F.R. Part 4, Subpart F. In interpreting these regulations, the Board has held that in order to constitute an "adversary adjudication" within the meaning of 5 U.S.C. § 504(b)(1)(C)(i) and 43 C.F.R. § 4.602(b), the proceeding must be a matter that is required by statute to be conducted "on the record," i.e., a proceeding that is required by statute to be conducted under 5 U.S.C. § 554 by an administrative law judge appointed under 5 U.S.C. § 3105. See Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director, 17 IBIA 141 (1989); In re Attorney's Fees Request of DNA--People's Legal Services, Inc., 11 IBIA 285, 90 Interior Dec. 389 (1983); In re Attorney's Fees Request of Madelon Blum, 9 IBIA 281, 89 Interior Dec. 241 (1982). * * * See also Ardestani v. Immigration and Naturalization Service, 502 U.S. 129 (1991).

Appellants state at page 2 of their Application that the earlier proceeding was "an adversary adjudication conducted by the Office of Hearings and Appeals under 5 U.S.C. § 554, which are required to be determined on the record after opportunity for an agency hearing." However, Appellants do not cite the

1/ All further citations to the United States Code are to the 1994 edition.

statute which required the earlier proceeding to be conducted under section 554, and that proceeding was, in fact, not conducted under section 554.

The Board gave Appellants an opportunity to show that the earlier proceeding was an "adversary adjudication" within the meaning of the EAJA and the Department's implementing regulations.

The Board received Appellants' response on November 13, 1997. Appellants state that in view of the decisions cited in the Board's October 10, 1997, Order and the Board's lack of authority to declare a duly promulgated Departmental regulation invalid, their response would be futile. Nevertheless, they responded in order to make a record.

The Department's regulations provide in 43 C.F.R. § 4.602(b) that "[a]dversary adjudication means an adjudication under 5 U.S.C. 554." Appellants admit that the earlier proceeding was not a proceeding under 5 U.S.C. § 554. The Board lacks authority to declare a duly promulgated Departmental regulation invalid. See also Danard House Information Services Division, Ltd. v. Sacramento Area Director, 25 IBIA 212, 218 (1994), and cases cited therein. Because the earlier proceeding was not an "adversary adjudication" within the meaning of the Department's regulations, this application for attorney fees under EAJA must be denied.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this Application for attorney fees and expenses under the Equal Access to Justice Act is denied.

Kathryn A. Lynn
Chief Administrative Judge

Anita Vogt
Administrative Judge